No. (1)

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

KNIGHTS OF THE KU KLUX KLAN, Realm of Missouri, and Michael Cuffley,

Petitioners,

v.

CURATORS OF THE UNIVERSITY OF MISSOURI; Patricia Bennett, in her official capacity as general manager of KWMU Radio only; Theodore C. Beckett, in his official capacity as Curator of the University of Missouri; Paul T. Combs, in his official capacity as Curator of the University of Missouri; Adam B. Fischer, in his official capacity as Curator of the University of Missouri; Mary S. Gillespie, in her official capacity as Curator of the University of Missouri; Fred L. Hall, Jr., in his official capacity as Curator of the University of Missouri; Malaika B. Horne, Dr., in her official capacity as Curator of the University of Missouri; John A. Mathes, in his official capacity as Curator of the University of Missouri; Paul W. Steele, in his official capacity as Curator of the University of Missouri; Hugh E. Stephenson, Jr., Dr., in his official capacity as Curator of the University of Missouri,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment allows a State University radio station to refuse the routine sale of broadcast announcements to the Ku Klux Klan solely on the assertion that University students, donors, and other broadcast announcement purchasers will be offended by the Klan's identity and viewpoint?

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 2000 WL 189834 (8th Cir. 2000) (App.A, *infra*). The judgment of the District Court for the Eastern District of Missouri is reported at 29 F.Supp.2d. 576 (E.D. Mo 1998). (App. B, *infra*).

STATEMENT OF JURISDICTION

The Eighth Circuit entered its judgment on February 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The University of Missouri radio station[1] routinely sells thousands of broadcast announcements as a benefit[2] to hundreds of private parties for the broadcast of private messages.[3]

The radio station refuses to sell broadcast announcements to Appellants Knights of the Ku Klux Klan, Realm of Missouri despite its admission that the Klan and

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1. The Curators of the University of Missouri is a public corporation established under the law of the State of Missouri. The Curators operate the University of Missouri that, in turn, operates radio station KWMU.

2. The radio station sales division sells 15 second broadcast announcements designated "underwriting messages." The radio station sales brochure states: "Underwriting is your opportunity to reach a targeted group of well educated, affluent people in the greater St. Louis area, including east central Missouri and southwestern Illinois. ...Underwriting on KWMU-FM 90.7 provides valuable recognition to the underwriter...."

3. The University concedes that the underwriting message itself is neither a statement of its policy nor its speech, and that the underwriting message is the speech of the underwriters.

its proposed broadcast announcement are permissible by law and radio station written regulations.[4]

The Klan filed for injunctive relief and declaratory judgment in the United States District Court for the Eastern District of Missouri pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983, alleging that the radio station's refusal to sell broadcast announcements to the Klan violates the First Amendment, as applied to the States through the Fourteenth Amendment.

Both the Eighth Circuit (Appendix A, p.8, *infra.*) and the District Court (Appendix B, p. 9, *infra.*) expressly found that the radio station refused such sale because of its belief that the Klan's identity would offend University students, donors, and other underwriters, allegedly resulting

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4. A wide range of commercial, not-for-profit and social action organizations are permitted to purchase broadcast announcements, including car dealers, law firms, duct cleaning services, dating services, Planned Parenthood, American Friends Service Committee, Acquinas Institute of Theology, and The American Jewish Congress .

Social action and political advocacy organizations are allowed to advance their cause and philosophy: e.g.:

[program name] is brought to you by the St. Louis based Human Rights Action Service, celebrating fifty years of the universal declaration of human rights and preparing letters for subscribers responding to human rights cases.

[Program name] is brought to you by American Friends Service Committee, working for passage of an arms trade code of conduct to stop the sale of U.S. weapons to dictators and to end the arms trade boomerang. For more information, call 314-862-5773.

[program name] is made possible in part by Aquinas Institute of theology -- a national leader in preaching education -- dedicated to preparing church leaders for the 21st century presenting the great preacher award to Monsignor James Telhorst at the Ritz-Carlton -- call 977-3869.

[program name] is made possible in part by Planned Parenthood of the St. Louis region providing a wide range of health and education services from contraceptive care to education programs for families. Planned Parenthood, we're more than you think, 533- 9933.

in a decline in University revenue and enrollment.[5] The Eighth Circuit also held that the radio station was entitled to exclude the Klan's offensive viewpoint in the exercise of editorial discretion. (Appendix A., p.19, *infra.*)

The radio station's sale of thousands of broadcast announcements to hundreds of private parties, while excluding Appellants on the basis of invidious viewpoint discrimination, justifies summary reversal of the Eighth Circuit opinion.

REASONS FOR GRANTING THE WRIT

The radio station's refusal to sell broadcast announcements to the Klan in reaction to its identity and viewpoint presents a unique opportunity to affirm First Amendment principles prohibiting government punishment of disfavored viewpoints: an opportunity lacking in prior cases where the government asserted non-viewpoint related reasons for its action.

The State's imposition of politically acceptable beliefs and viewpoints as a means of allocating government benefits remains a constant danger to the continued vitality of the First Amendment. The Eighth Circuit creates a new rule in conflict with all relevant decisions of this Court: that the State's grant of favored status to beneficiaries on the basis of their viewpoint and identity constitutes government speech, entitled to editorial discretion. This new rule creates a fissure in the fabric of the First Amendment, offering States an excuse for denying participation in a government benefit program on the grounds that other program participants will be offended by unorthodox views

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5. The Court's characterization of the radio station's rationale as "economic" does not negate the impermissible viewpoint discrimination. Surely, Southern restaurant owners in the 1960s justified their racial discrimination as "just business."

and politics.

The State may not allocate public benefits on a basis that discriminates against disfavored viewpoints. *National Endowment for the Arts v. Finley*, 118 S.Ct. 2168, 2178 (1998). The radio station may not refuse to sell broadcast announcements to private parties on the basis of subjective criteria for the purpose of suppressing dangerous ideas. *Id.*

The State does not "speak" by its allocation of public benefits, *see, Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384,386,, 113 S.Ct. 2141, 2143-4, 124 L.Ed. 2d 352 (1993) (School auditorium); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555, 95 S.Ct. 1239, 1244-5, 43 L.Ed. 2d 448 (1975) (Municipal auditorium). Nor does *Arkansas Educ. Television Comm'n v. Forbes*, 118 S.Ct. 1633 (1998) authorize discriminatory allocation of public benefits. Even in the case of government funding, a pressing constitutional question arises when the government imposes a disproportionate burden "calculated to drive certain ideas or viewpoints from the marketplace." *Finley*, 118 S.Ct. at 2179, *quoting, Simon & Schuster Inc. v. members of N.Y. Crime Victims Bd.*, 502 U.S. 105,116, 112 S.Ct. 501, 508, 116 L.Ed. 2d 476 (1991).

The State's desire to "avoid the discomfort and unpleasantness that always accompanies an unpopular view," *Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 799, 105* S.Ct. *3439*, 3462, *87 L.Ed.2d 567 (1985)*, is the very definition of invidious viewpoint discrimination.[6]

6."[V]iewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond." *Rosenberger v. Rector & Visitors of the University of Virginia*, 115 S.Ct. 2510, 2548 (1995).

CONCLUSION

For these compelling reasons of Constitutional importance, the Court should grant this Writ of Certiorari with an accompanying order of Summary Reversal.

Respectfully submitted,

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APPENDIX A

KNIGHTS OF THE KU KLUX KLAN, Realm of Missouri, and Michael Cuffley, Appellants, v.

CURATORS OF THE UNIVERSITY OF MISSOURI; Patricia Bennett, in her official capacity as general manager of KWMU Radio only; Theodore C. Beckett, in his official capacity as Curator of the University of Missouri; Paul T. Combs, in his official capacity as Curator of the University of Missouri; Adam B. Fischer, in his official capacity as Curator of the University of Missouri; Mary S. Gillespie, in her official capacity as Curator of the University of Missouri; Fred L. Hall, Jr., in his official capacity as Curator of the University of Missouri; Malaika B. Horne, Dr., in her official capacity as Curator of the University of Missouri; John A. Mathes, in his official capacity as Curator of the University of Missouri; Paul W. Steele, in his official capacity as Curator of the University of Missouri; Hugh E. Stephenson, Jr., Dr., in his official capacity as Curator of the University of Missouri, Appellees.

American Civil Liberties Union of Eastern Missouri, Amicus on Behalf of Appellants. National Public Radio, a/k/a National Public Radio, Inc., Amicus on Behalf of Appellees.

No. 99-1168.

Appeal from the United States District Court for the Eastern District of Missouri.

BEFORE: MCMILLIAN, MURPHY, and TUNHEIM, [1]
Circuit Judges.

MCMILLIAN, Circuit J.

The Knights of the Ku Klux Klan, Realm of Missouri ("Missouri KKK"), and Michael Cuffley, the state coordinator for the Missouri KKK (together "appellants"), appeal from a final order entered in the United States District Court [2] for the Eastern District of Missouri granting summary judgment in favor of the individual Curators of the University of Missouri and Patricia Bennett, general manager of the radio station KWMU (together "appellees"). See *Knights of the Ku Klux Klan, Realm of Missouri v. Bennett*, 29 F.Supp.2d 576 (E.D.Mo.1998). For reversal, appellants argue that the district court erred in holding that, in light of certain facts not genuinely disputed, appellees' rejection of the Missouri KKK as an underwriter violated neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment. For the reasons discussed below, we affirm the order of the district court.

Jurisdiction

Jurisdiction in the district court was proper based upon 28 U.S.C. § 1343. Jurisdiction in the court of appeals was

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1. The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

2. The Honorable Thomas C. Mummert, III, United States Magistrate Judge for the Eastern District of Missouri.

proper based upon 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Fed.R.App.P. 4(a).

Background

KWMU is a not-for-profit public broadcast radio station located on the campus of the University of Missouri at St. Louis ("UMSL"). KWMU is owned and operated by The Curators of the University of Missouri, a public corporation established under state law, see Mo.Rev.Stat. § 172.020 (1999), and licensed by the Federal Communications Commission ("FCC") to run the station. *See* 29 F .Supp.2d at 577. The Chancellor of UMSL, Dr. Blanche Touhill, is responsible for overseeing KWMU's operation. See Appellees' Appendix at 249. Patricia Bennett, the director and general manager of KWMU, supervises the station's administration, development, engineering, programming, and sales divisions on a daily basis. Bennett also communicates weekly with Dr. Donald Dreimeier, Deputy to the Chancellor of UMSL, who in turn reports to Touhill. See Transcript of Dist. Ct. Evidentiary Hearing at 7, 9 (Aug. 12, 1998) [hereinafter "Tr."].

To help fund the station, KWMU operates an "enhanced underwriting" program within its sales division. See id. at 30, 32. Pursuant to federal law, the station acknowledges on air any individual or group source of funding for a particular broadcast matter. See 47 U.S.C. § 317(a)(1) (requiring on-air announcement at time of sponsored broadcast identifying source of "any money, service or other valuable consideration ... directly or indirectly paid, or promised to or charged or accepted by" the broadcasting station). Contributors of such funds are referred to as "donors" or "underwriters." See, e.g., In re Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting, Public Notice, 7 F.C.C.R. 827 (1992) ("1992 Order"). Although federal law forbids noncommercial educational FM broadcasters like KWMU

from broadcasting "advertisements," see 47 U.S.C. § 399b; 47 C.F.R. § 73.503(d), public broadcasters are permitted to "enhance" or expand the scope of donor or underwriter acknowledgments by including (1) logograms or slogans which identify the underwriter but do not promote it, (2) location information on the donor, (3) value neutral descriptions of the underwriter's product line or service, and (4) donor brand names, trade names, and product or service listings. See In re Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, 97 F.C.C.2d 255, 263 (1984) ("1984 Order"). Typically, the announcement is a fifteen-second message, drafted by the underwriter or KWMU staff. See Tr. at 38-39. All scripts are reviewed and edited by station management to ensure compliance with federal law and regulations as well as KWMU underwriting guidelines, [3]

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3. KWMU's underwriting guidelines provide, in relevant part, as follows:

On-air Identification of Underwriters:

1.) An underwriter of programming is required by the FCC to be identified by its legal name or [its] recognized name of operation.

2.) An entire underwriting announcement may not exceed 15 seconds, including underwriters['] name and name of program sponsored.

3.) On-air announcements may include:

(a) The name of the organization[.]

(b) A logogram or slogan that identifies but does not promote. Logograms and slogans must comply with the rules outlined in FCC 86-161.

(c) Location[.]

(d) Value neutral descriptions of a product line or service.

(e) Trade names, product or service listings that aid in identifying the donor.

4.) On-air announcements may not include:

because UMSL (as the licensee of KWMU) is ultimately liable for all transmissions. See, e.g., 47 U.S.C. § 503(b)(1), (b)(2)(A) (forfeiture provisions); Russellville Educ. Broadcast Found., Licensee of KMTC (FM), Letter, DA 99-1280 (July 1, 1999) (imposing $2500 forfeiture penalty for impermissible advertisements); Penfield Communications, Inc., Licensee of KRTM (FM), Memorandum Opinion & Order & Forfeiture Order, DA 98-2407 (Nov. 25, 1998) (imposing $4000 forfeiture penalty for same reasons).

(a) A call to action to use a product or service, or inducement to buy, sell, rent [or] lease or visit.

(b) Qualitative or comparative description of a company, its products or services.

(c) Pricing information or indication of associated savings or value.

(d) Logograms or slogans that contain comparative or qualitative descriptions or are promotional in nature.

(e) More than three trade names, product[s] or service listing[s] in a single announcement.

(f) Any form of misrepresentation.

(g) The words "you," "your" and "we." Use of these words implies a relationship between the funder and the listener, rather than just between the funder and KWMU.

5.) No pre-produced underwriting announcements, audio logos, or musical themes will be accepted.

[6.]) KWMU airs no more than three local underwriter announcements at each scheduled break.

[7.]) Under FCC rules, [regulations] and policies, KWMU has a duty to determine what programming will best serve the public interest. The selection of spokespersons, format, subject matter, duration and scheduling of broadcast material is a matter within KWMU's discretion. KWMU reserves the right to reject any material.

Appellants' Appendix at 109-11.

As general manager, Bennett designates the percentage of total air time available for underwriting spots as well as the amount of underwriting time allotted to particular programs. See Tr. at 21-22. Bennett accepts donor funds from, and approves accompanying messages of, approximately thirty underwriters per week. See id. at 122. As a matter of course, Bennett does not examine the philosophy or policies of each potential donor. See id. at 62. Nonetheless, prior to the institution of this action, Bennett has rejected financial support from several potential underwriters. See 29 F.Supp.2d at 578 (noting rejection of underwriting requests from a group called "Ultimate Fighting Championships," a political entity titled "The American Friends Service Committee," and an establishment known to be "a house of ill repute").

Some time prior to September 24, 1997, Michael Cuffley [4] contacted KWMU by telephone and requested information on underwriting several fifteen-second spots for NPR's "All Things Considered" program. See Tr. at 160-61. Cuffley testified that he enjoyed the program, wanted to support KWMU, and hoped to attract more highly educated people to his organization. See id. at 159-60. Cuffley did not initially identify himself or his

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4. As state coordinator for the Missouri KKK, Cuffley is the highest ranking official of that organization. Cuffley's duties for the Missouri KKK include speaking at public events, planning activities, and coordinating activities with other Ku Klux Klan organizations around the country. See Tr. at 157-59.

Although not "officially" tied to any other Ku Klux Klan groups, the Missouri KKK subscribes to the general principles of the Ku Klux Klan and traces its roots back to 1865 and the aftermath of the Civil War. As such, the Missouri KKK admits only American-born, white Christians, does not openly advocate violence, but does participate in "cross-lightings" at which members wear traditional white robes and hoods. Cuffley himself has participated in over a hundred such cross-lightings. See id. at 170-71.

organization. See id. at 161. A KWMU sales representative quoted Cuffley the underwriting costs for not-for-profit organizations and requested his telephone number, advising Cuffley that a sales representative would contact him at a later date. See id. at 161, 163. At that point, no agreement was reached between KWMU and Cuffley.

On September 24 and 29, 1997, Cuffley wrote to KWMU requesting the opportunity for the Missouri KKK to sponsor four segments of NPR's "All Things Considered." See 29 F.Supp.2d at 578. Cuffley submitted the following message to KWMU to be read as an underwriting acknowledgment:

> The Knights of the Ku Klux Klan, a White Christian organization, standing up for rights and values of White Christian America since 1865. For more information[,] please contact the Knights of the Ku Klux Klan, at P.O. Box 525[,] Imperial, Missouri[,] 63052. Let your voice be heard!

Appellees' Appendix at 122.

Bennett contacted her immediate supervisor, Driemeier, and requested a decision from Chancellor Touhill regarding the Missouri KKK's proposed underwriting support. Bennett recommended that KWMU refuse the funds but did not outline reasons for this recommendation. See Tr. at 91, 153-54. Driemeier told Touhill of the Missouri KKK's offer but did not inform her of Bennett's recommendation. Prior to making her decision, Touhill did not speak with Bennett regarding the matter. See id. at 124, 154. No one had previously consulted Touhill regarding the acceptance or rejection of underwriting funds. See id. at 132.

Touhill ultimately rejected the Missouri KKK's proposed underwriting gift. See id. at 131, 133. At the district court evidentiary hearing, Touhill explained her

decision as follows. She first noted that KWMU was legally required to acknowledge donors on the air. See id. at 133, 135. Touhill anticipated that an acknowledgment of the Missouri KKK as an underwriter would result in a significant loss of revenue to UMSL. Touhill specifically stated that these business and economic reasons, and not the views of the Missouri KKK, were the basis for her decision. See id. at 135-36.

In some detail, Touhill outlined the negative consequences of accepting underwriting funds from the Missouri KKK. First, Touhill believed Missouri KKK sponsorship would jeopardize future gifts from major African-American donors. See id. at 133-35. Based on her experience and interaction with these donors, Touhill predicted a twenty percent decline in annual gifts to UMSL, or a loss of some two million dollars per year. See id. at 148. Second, Touhill projected a drop in student enrollment if the Missouri KKK were accepted as an underwriter. Touhill estimated that twenty-five percent of the 1,565 African-American students at UMSL (and ten percent of the 9,142 white students) would leave the school, resulting in an annual loss of over three million dollars. See id. at 147-48. Finally, Touhill stated that KWMU's association with the Missouri KKK would counteract her efforts, both as the primary spokesperson for UMSL and as a member of multiple civic and corporate boards, in creating and maintaining a level playing field in the community for African-Americans. See 29 F.Supp.2d at 580.

Based on Touhill's decision, Bennett wrote Cuffley on October 3, 1997, and informed him that KWMU would not accept underwriting funds from the Missouri KKK. See Appellants' Appendix at 79. Appellants subsequently filed this action in the district court, seeking injunctive and declaratory relief on their claim that appellees had violated their First and Fourteenth Amendment rights by refusing

their request for program underwriting. The parties subsequently filed cross-motions for summary judgment. See 29 F.Supp.2d at 577.

After a full hearing on the merits, the district court granted appellees' motion for summary judgment and denied appellants' cross-motion. The district court held that KWMU's enhanced underwriting program was not a forum for speech and therefore did not implicate the First Amendment. See id. at 583-84. The district court initially noted that public broadcasters are not common carriers in interstate commerce, but rather licensed "public trustees," with the responsibility to "schedule programming that serves the public interest, convenience, and necessity." Id. at 582-83 (quoting *Arkansas Educ. Television Comm'n v. Forbes*, 118 S.Ct. 1633, 1639 (1998) (*Forbes*)) (internal citations omitted). Thus, the district court reasoned, Congress' decision to license broadcasters in such a manner indicated its preference that "the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many," *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 125 (1973) (*CBS*), and meant that public broadcasting "as a general matter does not lend itself to scrutiny under the forum doctrine," with the exception of political candidate debates. *Forbes*, 118 S.Ct. at 1640. The district court reasoned that, because this case did not fall within the scope of the exception outlined under *Forbes*, no forum examination was necessary. See 29 F.Supp.2d at 583-84. The district court specifically rejected appellants' argument that the enhanced underwriting program, as a revenue-generating operation analogous to advertising space on public buses, did not "enjoy the protection granted in *Forbes* to editorial discretion." Id. at 584. The district court determined that broadcasters' finite amount of air time meant that anything broadcast during that time was a matter of discretion and was subject only to license, FCC, and internal restrictions.

Otherwise, "[t]o interpret the enhanced underwriting program as a forum would be to engage the courts in the day to day operation of the radio station--an engagement prohibited by *Forbes*." Id. In the alternative, under a forum analysis, the district court held that KWMU's enhanced underwriting program was not a designated public forum and was, at best, a nonpublic forum in which rejection of the Missouri KKK as an underwriter was based on uncontradicted business and economic reasons and did not constitute an attempt to suppress the group's viewpoint. See id. at 586-87. This appeal followed.

Discussion

We review the district court's grant of summary judgment de novo, applying the same standard as the district court. *See Brandt v. Davis*, 191 F.3d 887, 891 (8th Cir.1999). Summary judgment is appropriate when it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "All facts are viewed in the light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences to be drawn from the facts." *Portis v. Folk Constr. Co.*, 694 F.2d 520, 522 (8th Cir.1982).

For reversal, appellants initially claim that the underwriting acknowledgments do not constitute government speech and therefore are not shielded from forum analysis. Appellants contend that *Forbes* does not "immunize all activities conducted in the name of public broadcasting from First Amendment scrutiny," but instead insulates only governmental speech and communicative activity. Reply Brief at 7. Specifically, appellants argue that the *Forbes* Court sought to protect from outside interference a public broadcaster's selection and presentation of third party speech within its broadcast programming. See *Forbes*, 118 S.Ct. at 1639 ("When a

public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.... Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts.") (citations omitted). Appellants assert that, although the station is normally engaged in such protected speech for the better part of its broadcast, KWMU "relinquishes its speaker's role and becomes a mere conduit of third party speech" through its enhanced underwriting program. Reply Brief at 8. Appellants note that, although KWMU initially exercises its editorial discretion by setting aside time for the broadcast of third party messages and later exerts some control over the content and form of underwriters' messages, KWMU admittedly does not investigate, promote, or vouch for the views expressed within the underwriting spot. Thus, appellants argue, the underlying nature of the underwriter spots remains unchanged: the underwriting acknowledgments clearly express the speech and viewpoints of the underwriters, not KWMU. [5] Cf. *Bryant v. Secretary of the Army*, 862 F.Supp. 574, 580-81 (D.D.C.1994) (*Bryant*) (finding that letters to editor published in military base newspaper "clearly d[id] not reflect government speech in any ordinary sense of the term" and thus Army's editorial regulation, which "touche[d] upon instances in which the Government is seeking to regulate speech," was not immunized from First

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5. Appellants contend that the district court "confuse[d] the medium with the message," see Brief of Appellants at 41, by stressing the significance of a KWMU employee, rather than a donor representative, reading the underwriting announcement. See 29 F.Supp.2d at 583. Appellants argue that the use of government employees to facilitate transmission to the public is irrelevant, as long as the messages are those of the underwriters and not of the government. See, e.g., *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242 (3d Cir.1998) (ads in public subway and railway stations presumably posted by government employees).

Amendment challenges). Accordingly, this lack of government speech means that KWMU's enhanced underwriting program is afforded no insulation from forum analysis under Forbes.

Appellants further assert that the enhanced underwriting program is merely a revenue-generating operation without journalistic or editorial character and, as such, cannot claim protection from forum analysis under *Forbes*. Appellants claim that Forbes insulates only matters of editorial or journalistic discretion and that KWMU's exchange of airtime for funds is not of the journalistic or editorial quality protected by *Forbes*. [6] See *Forbes*, 118 S.Ct. at 1640 ("Claims of access under our public forum precedents could obstruct the legitimate purposes of ... broadcasters. Were the doctrine given sweeping application in this context ... '[t]he result would be a further erosion of the journalistic discretion of broadcasters,' transferring 'control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals.' ") (quoting *CBS*, 412 U.S. at 124). Instead, KWMU's enhanced underwriting program was a "discrete and severable activity from KWMU's primary journalistic function ... administered by sales people with business

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6. Amicus curiae American Civil Liberties Union of Eastern Missouri ("ACLU") refines this argument by drawing a strict distinction between "programming" and "programming breaks" such as underwriting announcements. See, e.g., 47 U.S.C. § 399a(b) (requiring that sponsorship announcements not interrupt "regular programming"). ACLU contends that Forbes protection only extends to the editorial discretion involved in programming. See, e.g., *Forbes*, 118 S.Ct. at 1639 ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."). Based on this narrow reading of *Forbes*, ACLU argues that programming breaks are not of adequate journalistic caliber and thus forum analysis is required.

concerns, not journalists with editorial concerns." Brief for Appellants at 43. Appellants contend that this "selling" of airtime to underwriters is analogous to the sale of advertising spaces on or within public transit facilities. See, e.g., *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1227 (7th Cir.1985) (finding transit authority's refusal to sell plaintiff advertising space on its buses and transit cars constitutionally impermissible). Moreover, the fact that KWMU requires a donation (or charges a fee) for the underwriting announcements does not "negate the possibility that the government" has created a forum. *Airline Pilots Ass'n Int'l v. Department of Aviation*, 45 F.3d 1144, 1155 (7th Cir.1995); see also *United Food & Comm. Workers Union, Local 1099 v. Southwest Ohio Reg. Transit Auth.*, 163 F.3d 341, 353-54 (6th Cir.1998) ("[T]he goal of generating income by leasing ad space suggests that the forum may be open to those who paid the requisite fee."). .Because "[e]nhanced underwriting is no more journalism than advertisements on the outside of buses are transportation," appellants argue that the district court misapprehended the scope of *Forbes* and thereby erred in refusing to apply forum analysis to KWMU's enhanced underwriting program. Brief for Appellants at 42.

Appellants additionally argue that courts can properly apply forum analysis under Forbes where the broadcaster intentionally sets aside time for the presentation of third party views. Appellants imply that, although "the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming," *Forbes*, 118 S.Ct. at 1640 (emphasis added), broadcasters may create fora through their own intentional, voluntary actions. For example, in the context of candidate debates, the Forbes Court specifically noted that forum analysis was appropriate because the broadcasting activity was by design a forum for the

candidates' political speech, "where the views expressed were those of the candidates, not [the broadcaster's] own." Id. Appellants argue that KWMU has similarly provided affirmative public access to its airwaves by dedicating airtime to the specific purpose of transmitting underwriter speech in exchange for underwriting funds. Accordingly, appellants contend that the district court should have analyzed KWMU's voluntarily created, enhanced underwriting program under the forum doctrine. We disagree.

We reiterate *Forbes* ' admonition that "[h]aving first arisen in the context of streets and parks, the public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting." Id. at 1639. [7] Although open access and viewpoint neutrality may be compatible with the intended aims of streets and parks, such forum requirements are for the most part inapplicable in the context of public broadcasting, where substantial discretion is accorded to broadcasters with respect to the daily operation of their stations. See id. ("[B]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."). Instead of being compelled to open their facilities "on a nonselective basis to all persons wishing to talk about public issues," *CBS*, 412 U.S. at 105, public broadcasters enjoy the "widest journalistic freedom" consistent with their statutory

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7. *Forbes* specifically dealt with the arena of public television broadcasting. However, for the purposes of First Amendment analysis, public radio and public television are ordinarily treated the same, see *Schneider v. Indian River Community College Found.*, 875 F.2d 1537, 1541 (11th Cir.1989) (*Schneider*), as are television and radio generally. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994) (Turner).

obligations to broadcast material serving the "public interest, convenience, and necessity." Id. at 110; 47 U.S.C. § 309(a). Because broad application of the forum doctrine in this context would require "oversee[ing] far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired," *CBS*, 412 U.S. at 127, "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine." *Forbes*, 118 S.Ct. at 1640. Against this backdrop, we reject appellants' principal contention that the district court erred in determining that KWMU's enhanced underwriting program was not a forum.

First and foremost, KWMU's underwriting acknowledgments constitute governmental speech on the part of UMSL. Contrary to appellants' contentions, the central purpose of the enhanced underwriting program is not to promote the views of the donors, but to acknowledge "any money, service, or other valuable consideration ... directly or indirectly paid, or promised to or charged or accepted by" the station with respect to the broadcast of any matter. 47 U.S.C. § 317(a)(1). In other words, KWMU's underwriting announcements are federally-mandated sponsorship identifications, in which UMSL "speaks" by airing its acknowledgments of funds received from certain parties to pay for specific KWMU broadcasts. Because KWMU must by law publicly advise its listeners as to the sources of funds "accepted" for its broadcasts, UMSL's decision to accept or reject the funds of underwriters is itself a governmental decision to speak or remain silent. [8] Cf. *Muir v. Alabama Educ. Television*

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8. Even if KWMU were not legally required to acknowledge its underwriters, UMSL as the licensee of the broadcaster arguably still has the discretion to reject the underwriting funds in the first instance. 47 U.S.C § 301(a)(1) specifically states that sponsor identification

Comm'n, 688 F.2d 1033, 1044 (5th Cir.1982) (en banc) (*Muir*) ("The First Amendment does not prohibit the government itself from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial discretion over its own medium of expression."). As speaker, UMSL exercises control not only over the decision to accept or reject the donations, but also over the form and content of the announcements themselves. [9] Cf.

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acknowledgments are necessary where valuable consideration has to be "accepted by" the broadcaster; presumably, if the licensee can "accept" the funds, it can voluntarily reject the funds as well. See The FCC and Broadcasting, 1800C1-FCC (December 1998) (implying that stations have discretion to reject underwriting funds for tobacco and alcoholic beverage producers, even though FCC has no specific rule directing station licensees to accept or reject such funds). Moreover, appellants can offer no support in the case law for the proposition that, where descriptive information about the donor is conveyed to the public, a donor has a First Amendment right to have its cash contribution accepted by the donee, in this case, UMSL.

9. Appellants contend that, because KWMU does not investigate, promote, or vouch for the underwriter's products, services, or goals, the announcements therefore must express the views of the underwriters, not the government. See Brief of Appellants at 40. Although the logograms, slogans, and product summaries in these fifteen-second acknowledgments may in fact identify the underwriter, conveyance of this collateral information remains a communicative act of the government, even if it only involves a compilation of third-party speech. See *Forbes*, 118 S.Ct. 1633, 1639 ("Although [broadcaster] programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995) (noting that a speaker need not "generate, as an original matter, each item featured in the communication"). Notably, this governmental announcement of broadcast sponsorship is a far cry from letters to the editor published in a government newspaper, where the letters (while edited for space limitations) are more obviously the speech of the writer, not the government. See *Bryant*, 862 F.Supp. at 580.

Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 833 (1995) (*Rosenberger*) ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.") (emphasis added); *Schneider*, 875 F.2d at 1540 (noting that, where "the activity is not designed to function as a pure marketplace of ideas, 'the state may regulate content in order to prevent hampering the primary function of the activity.' ") (quoting *Muir*, 688 F.2d at 1050)). KWMU staff members compose, edit, and review acknowledgment scripts to insure compliance with both FCC and internal guidelines. Moreover, the station does not broadcast "pre-produced" announcements submitted by underwriters; instead, KWMU employees themselves read the acknowledgments on air. [10] Finally, as speaker and licensee, UMSL is ultimately responsible for all of its broadcast material, including the underwriting announcements, and is subject to sanctions for failure to comply with its legal obligations. See 47 U.S.C. §§ 309(a) (licensee duty to broadcast for public necessity, interest, etc.), 503(b)(1), (b)(2)(A) (forfeiture provisions). As appellees point out, "[i]t would be anomalous to impose these penalties on a station for any speech other than its own." Brief for Appellees at 29.

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10. Appellants also argue that the district court's reference to KWMU employees is improper, charging that the use of government employees for the transmission of the message is irrelevant to the analysis. Appellants misread the district court's analysis. The district court merely noted that, given the substantial editing, review, and lack of pre-produced messages, the announcements did not involve the expression of views with "minimal intrusion by the broadcaster," a criterion which helped form the basis for the Forbes Court's forum analysis of candidate debates.

Even assuming arguendo that insulation from forum analysis only arises for government speech adequately related to matters of editorial or journalistic discretion,[11] we believe that KWMU's enhanced underwriting program meets that prerequisite. Decisions about what material to broadcast (including underwriting acknowledgments) involve editorial discretion because the broadcaster must decide whether to publish, what to publish, what to say, and what not to say. See *CBS*, 412 U.S. at 124 ("For better or worse, editing is what editors are for; and editing is selection and choice of material."); 1 New Shorter Oxford English Dictionary 784 (4th ed.1993) (defining "edit" as "bring into order for publication after compilation by others or oneself"). Given that UMSL's license and corresponding obligations extend to "all matter broadcast," 47 U.S.C. §§ 301, 317, its editorial discretion is co-extensive and not limited to appellants' strict definition of "programming." See *CBS*, 412 U.S. at 123-25 (holding that broadcast licensees are not required to accept all paid political

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11. The Supreme Court has recently distinguished, in dicta, between speech on government property and speech by the government. In *Rosenberger*, 515 U.S. at 833, the Court noted that "when the State is the speaker, it may make content-based choices." Specifically, the Court has "permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." Id. Moreover, whereas forum analysis and viewpoint neutrality may be required when the government "expends funds to encourage a diversity of views from private speakers," the government's "own speech ... is controlled by different principles." Id. at 834. Aside from these statements, no other Supreme Court decisions define the limitations, if any, which would be placed on such governmental speech. See 4 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 20.11, at 279 & n. 2 (3d ed.1999) (noting scholarly work on the governmental speech question). Because the speech in the instant case is also sufficiently editorial in character to fall within the scope of Forbes, we need not decide whether its status as governmental speech is alone enough to preclude forum analysis.

advertisements, because such forced access would "tend to transform broadcasters into common carriers and would intrude unnecessarily upon the editorial discretion of broadcasters.") (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 379 (1984)); see also *Turner*, 512 U.S. at 636 (noting that the editorial discretion of cable operators extends not only to its choice of programs but also to "which stations ... to include in its repertoire") (quoting *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)). In the instant case, UMSL did not wish to "publish" a financial association with the Missouri KKK. Because "accepting" underwriting funds from the Missouri KKK would trigger statutorily-mandated publication, UMSL utilized its editorial discretion by rejecting the proposed sponsorship in the first place and thus choosing to remain silent. [12] To require UMSL to accept program sponsorship from all sources would surely intrude upon the editorial discretion which Congress delegated. See *CBS*, 412 U.S. at 124-25 ("That editors--newspapers or broadcast--can and do abuse this [editorial] power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.... To agree that debate or public issues should be 'robust, and wide-open' does not mean that we should exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators.").

Appellants' analogy to public transit and airport ads is ill-chosen. As stated supra, the advertising in those cases

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12. Appellants' argument to the contrary, see Brief for Appellants at 43, Chancellor Touhill's status as a non-journalist does not undercut her power to make editorial determinations, because such decisionmaking power is vested in the broadcaster licensee and delegated to the Chancellor. See *CBS*, 412 U.S. at 124; *Muir*, 688 F.2d at 1044 (upholding university vice-president's decision to cancel a program on university's public television station).

communicated the speech of private individuals and groups, whereas the announcements here were the government's acknowledgments of program funding sources. Second, the underwriting spots do not fall within conventional understandings of promotional advertising, where companies freely trumpet their products and services. See 47 U.S .C. § 399b (forbidding public broadcasters from airing "advertisements," which "promote any service, facility, or product offered by any person who is engaged in such offering for profit" or which "express the views of any person with respect to any matter of public importance or interest."); see also 1992 Order, 7 F.C.C.R. 827 (clarifying scope of limits on underwriting announcements); 1984 Order, 97 F.C.C.2d at 263 (severely limiting content of underwriting announcements to certain types of identifying, but not promotional, information). Finally, the sponsorship identifications (and the donations that precede them) are related to the journalistic purposes of the station, in that the acknowledgments convey important, federally-mandated information to the public about the source of funding for particular broadcast material. This "news" relates to the purposes and functions of a noncommercial educational FM broadcaster, whereas public transit and airport ads are only incidental to the primary goal of transportation. Cf. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682 (1992) (noting that goal of public airport terminal was "the facilitation of passenger air travel," not "the promotion of expression.").

In response to appellants' final argument, we note that forum analysis is not required by the mere fact of UMSL's creation of an enhanced underwriting program. UMSL instituted the enhanced underwriting program not to communicate underwriters' views, but rather to gather financial support for KWMU, to acknowledge such funding, and to provide brief identifications of its

underwriters. The presence of government speech in the instant case makes inappropriate appellants' comparison of the enhanced underwriting program to the exception for candidate debates, given that those debates "allow[ed] the candidates to express their views with minimal intrusion by the broadcaster." *Forbes*, 118 S.Ct. at 1640 (emphasis added). As stated before, no such private speech is at issue here.

Conclusion

We agree with the district court's conclusion that appellants' rights under the First and Fourteenth Amendments were not violated and appellees are entitled to judgment as a matter of law. Accordingly, we affirm the judgment of the district court.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

KNIGHTS OF THE KU KLUX KLAN, REALM OF MISSOURI, and MICHAEL CUFFLEY, Petitioners, vs. PATRICIA BENNETT, in her official capacity as General Manager of KWMU Radio only, et al., Respondents. NATIONAL PUBLIC RADIO, a/k/a NATIONAL PUBLIC RADIO, INC., Amicus Curiae. Case No. 4:97CV2109 TCM

MEMORANDUM AND ORDER

This matter is before the Court upon the parties' cross-motions for summary judgment. [Docs. 40, 44] The parties have stipulated to the submission of their dispute on the testimony at an evidentiary hearing held on August 12, 1998, on Petitioners' motion for a preliminary injunction; exhibits submitted at that hearing; and exhibits attached to the motions for summary judgment.

Background

The Knights of the Ku Klux Klan, Realm of Missouri, and Michael Cuffley, the state coordinator for the Missouri Knights of the Ku Klux Klan, initiated this action against respondents, the individual Curators of the University of Missouri, and Patricia Bennett, KWMU's general manager,[1]

[1]The Board of Curators, also named as a respondent, was previously dismissed by the Court. (See Order of July 13, 1998.)

seeking injunctive and declaratory relief on their claim that Respondents violated their First and Fourteenth Amendment rights when refusing the Ku Klux Klan's request to underwrite a program broadcast by KWMU.

As the state coordinator for the Knights of the Ku Klux Klan, Realm of Missouri, Mr. Cuffley is the highest ranking official in that organization in Missouri. (Tr. 157.)[2] He has held that position for six years. (Id.) Mr. Cuffley's duties for the Ku Klux Klan include speaking at public events, planning activities, and coordinating activities with other Ku Klux Klan organizations around the country. (Id. at 158.)

Mr. Cuffley's organization traces its roots back to 1865 and the aftermath of the Civil War. (Id.) His organization has no official ties to any other Ku Klux Klan organizations, other than the use of the term Ku Klux Klan in its title and a belief in the general principles of the Ku Klux Klan. The Ku Klux Klan admits only American-born white Christians. Mr. Cuffley testified that his organization does not advocate violence, but does participate in "cross lightings" -- Mr. Cuffley has participated in a hundred -- at which members wear the traditional robes and hoods. (Tr. at 171.)

KWMU is a not-for-profit public broadcast radio station operated by the University of Missouri at St. Louis ("UMSL"). Its licensee, the Curators of the University of

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[2]References to "Tr." are to the transcript of the August 1998 evidentiary hearing on Petitioners' Motion for Preliminary Injunction.

Missouri, is a member of National Public Radio, Incorporated ("NPR"). (Jackson Aff. at & 4.) The Director and General Manager of the radio station is Patricia Bennett. (Tr. at 7.) She reports to Dr. Donald H. Driemeier, the Deputy to the Chancellor of UMSL, who in turn reports to Dr. Blanch M. Touhill, the Chancellor of UMSL and its Chief Executive Officer. (Id. at 9.) The organizational chart for the station lists five divisions under Ms. Bennett's control: the program director, the business manager, the chief engineer, the development director, and the sales manager. (Id.) The development director is in charge of fund-raising, and the sales manager supervises the sales representatives that seek underwriting for the radio station. (Id. at 11, 12.) Only a certain percentage of air time is allotted for underwriting spots. (Id. at 20, 21.) What percentage is a decision made internally by the General Manager with input from her senior team. (Id.) Different amounts of time are set aside for underwriting for different shows, with some limitations being dictated by the type of program. (Id. at 21-22.)

When an organization makes an underwriting gift to KWMU, that organization is permitted to submit a fifteen-second message to be read on the radio station. (Id. at 33.) The donor provides a gift; KWMU acknowledges that gift on the air. (Id. at 38.) Some underwriting messages are drafted by the donors. (Id. at 38-39.) Other messages are drafted by, or with input and assistance from, KWMU's employees. (Id. at 39.) All underwriting scripts must be reviewed by the station's management. Enhanced underwriting permits the fifteen-second spot to provide identifying information about the organization and a logo or slogan of the donor's organization. (Id. at 29.) KWMU's

policy is to permit enhanced underwriting. (Pet'rs Ex. 2.)[3] Classes of underwriters include for-profit organizations, companies, and corporations; not-for-profit organizations, corporations and companies; and social services organizations. (Pet'rs Exs. 3-24, 26-37.)

Although Ms. Bennett approves the text of approximately thirty underwriting scripts per week, she does not examine, as a matter of course, the policy or philosophy of each potential underwriter. (Tr. at 62, 122.) She has rejected a request for underwriting from a group titled "Ultimate Fighting Championships"; an establishment she heard was "a house of ill repute"; and the American Friends Service Committee, the latter on the grounds that the group's message was political. (Id. at 118, 121-22; Bennett Dep. at 87.) Ms. Bennett testified that Federal Communications Commission ("FCC") regulations do not allow public radio stations to broadcast political announcements from candidates, except those running for federal office, or messages promoting or criticizing ballot issues. (Id. at 82.)

Some time prior to September 24, 1997, Mr. Cuffley contacted KWMU by telephone and requested information on underwriting a number of fifteen second spots on the station's "All Things Considered" program. (Id. at 160-61.) "All Things Considered" is a radio program that is produced and distributed by NPR, and is a part of KWMU's regular programming. (Jackson Aff. at & 5.) Mr. Cuffley

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[3]Unless otherwise noted, the exhibits referred to in this Memorandum and Order were submitted at the August 1998 evidentiary hearing.

testified that he enjoys the program and wishes to support the station. He hoped to attract a higher, more educated person to his organization. (Id. at 160.) He did not initially identify himself or his organization. (Id. at 161.) The sales representative quoted Mr. Cuffley the underwriting costs for not-for-profit organizations and requested his telephone number, advising Mr. Cuffley that a sales representative would contact him at a later date. (Id. at 161, 163.) There was no contract or agreement worked out between the representative and Mr. Cuffley. After approximately a week with no contact by KWMU, Mr. Cuffley made several telephone calls to the station but was unable to speak with a sales representative. (Id. at 163-64.) On September 24 and again five days later, Mr. Cuffley wrote letters to the station requesting the opportunity to sponsor four segments of "All Things Considered." (Resp'ts Ex. A.) The following message was submitted to the radio station by the Ku Klux Klan to be read in acknowledgment of the underwriting gift:

> The Knights of the Ku Klux Klan, a white Christian organization, standing up for rights and values of white Christian America since 1865. For more information, please contact the Knights of the Ku Klux Klan at Post Office Box 525, Imperial, Missouri, 63052. Let your voice be heard.

(Tr. at 86-87.)

The message proposed by the Ku Klux Klan to be read on air did not violate any of KWMU's enhanced underwriting guidelines.[4] (Id. at 89.)

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[4]The underwriting guidelines provide, in relevant part, as follows:

On-air Identification of Underwriters

1.) An underwriter of programming is required by the FCC to be identified by its legal or their recognized name of operation.

2.) An entire underwriting announcement may not exceed 15 seconds, including underwriters [sic] name and name of program sponsored.

3.) On-air announcements may include:

(a) The name of the organization[.]

(b) A logogram or slogan that identifies but does not promote. Logograms and slogans must comply with the rules outlined in FCC 86-161.

(c) Location[.]

(d) Value neutral descriptions of a product line or service.

(e) Trade names, product or service listings that aid in identifying the donor.

4.) On-air announcements may not include:

(a) A call to action to use a product or service, or inducement to buy, sell, rent of [sic] lease or visit.

(b) Qualitative or comparative description of a company, its products or services.

(c) Pricing information or indication of associated savings or value.

(d) Logograms or slogans that contain comparative or qualitative descriptions or are promotional in nature.

(e) More than three trade names, product or service listing in a single announcement.

(f) Any form of misrepresentation.

(g) The words "you," "your" and "we." Use of these words implies a relationship between the funder and the listener, rather than just between the funder and KWMU.

5.) No pre-produced underwriting announcements, audio logos, or musical themes will be accepted.

7.) [sic] KWMU airs no more than three local underwriter announcements at each scheduled break.

On October 3, Ms. Bennett wrote Mr. Cuffley a letter declining the underwriting gift. (Pet'rs Ex. 38.)

Mr. Cuffley testified that he was accustomed to receiving rejections on behalf of the Ku Klux Klan and fully expected that KWMU would reject the Ku Klux Klan's underwriting gift and proffered announcement. (Tr. at 167.)

Ms. Bennett recognized Mr. Cuffley's request as a potentially high profile issue which could result in litigation. (Id. at 127.) Consequently, she contacted Dr. Driemeier and requested a decision from the Chancellor as to how to proceed. (Id. at 91.) Ms. Bennett recommended to Dr. Driemeier that KWMU deny the Ku Klux Klan's underwriting request; however, she did not explain her reasons for her recommendation. (Id. at 91, 154.) Dr. Driemeier told Chancellor Touhill of the Ku Klux Klan's request, but did not inform her of Ms. Bennett's recommendation. (Id. at 131, 154.) Dr. Driemeier wanted

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> 8.) Under FCC rules, regualtions [sic] and policies, KWMU has a duty to determine what programming will best serve the public interest. The selection of spokespersons, format, subject matter, duration and scheduling of broadcast material is a matter within KWMU's discretion. KWMU reserves the right to reject any material.

(Pet'rs. Ex. 2.)

Chancellor Touhill to make her decision with an open mind. (Id. at 154.) Ms. Bennett did not speak with Chancellor Touhill about the proposed underwriting gift before the Chancellor made her decision. (Id. at 124.)

Chancellor Touhill rejected the Ku Klux Klan's offer to underwrite programming on KWMU. (Id. at 131, 133.) It was the only time that she had been asked to rule on the acceptability of an underwriting offer. (Id. at 132.) Chancellor Touhill testified that because the underwriting gifts must be publicly recorded, KWMU would be required to publicly acknowledge the Ku Klux Klan's gift and to read the Ku Klux Klan message on the air.[5] (Id. at 133, 135.) She further testified that her reasons for rejecting the Ku Klux Klan's proffer were based on business considerations, specifically the loss of revenue to the UMSL that would result from the Ku Klux Klan's message being read on the air. (Id. at 135-36.) This conclusion was based on her twenty-four years' experience in college administration. (Id. at 145, 149.) Chancellor Touhill testified that the views of an organization should not be the basis for KWMU's accepting or rejecting that organization's underwriting offer.

Chancellor Touhill listed several specific economic consequences that would be suffered by UMSL if the Ku Klux Klan's underwriting offer was accepted. First, a

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[5]Title 47 U.S.C. ' 317(a)(1) provides, in relevant part:

> All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged to or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, such person. . .

recurrent donor to the University is an African-American who suffered indignation in World War II because of his race. (Id. at 134.) He vowed to assist his race in overcoming this prejudice if he achieved financial success. He did, and has contributed $8.9 million to UMSL. (Id. at 146.) Chancellor Touhill feared the loss of this man's financial support to UMSL if the Ku Klux Klan message ran on air. This donor is also responsible for recruiting other donors in the community; thus, his withdrawn support would have adversely affected the support of others. (Id. at 134.) Second, UMSL is a relatively new institution and a member of a university system that is sensitive to its past history of resisting integration. (Id.) UMSL now enrolls and graduates more African-American students than any other college in the State. (Id.) Permitting the Ku Klux Klan to make an announcement on KWMU would be a reverse step in UMSL's efforts to maintain a diverse student population. Third, as the Chancellor of UMSL, its primary spokesperson, and most visible and high-profile representative, she is a member of a number of the region's civic and corporate boards whose objectives are to create and maintain a "level playing field" for African-Americans in the community. KWMU's association with the Ku Klux Klan would be detrimental to these efforts.

Chancellor Touhill conservatively estimated that if the underwriting was accepted, 25% of the 1,565 African-American students at UMSL would leave the school, resulting in a loss of approximately $920,000.00 to UMSL, and 10% of the 9,142 white students would leave, resulting in a loss of $2.1 million. (Id. at 147-48.) She also estimated that of the $10 million in annual gifts to UMSL, $2 million would be lost as a result of the Ku Klux Klan underwriting gift. (Id.)

Thus, UMSL would lose, according to the Chancellor's undisputed, conservative estimates, approximately

$5 million if the Ku Klux Klan's underwriting gift was accepted.

Discussion

Petitioners argue in their motion for summary judgment that KWMU's underwriting practices make it a designated public forum, and consequently, the Ku Klux Klan's underwriting offer, which was consistent with KWMU's guidelines, had to be accepted. Petitioners further argue that Respondents (i) impermissibly rejected this offer based on their perception of Petitioners' social and political views, (ii) employed an unconstitutionally overbroad and arbitrary editorial discretion, and (iii) had inherently unconstitutional reasons, i.e., reasons based on their perception of Petitioners' viewpoints, for excluding the Ku Klux Klan from KWMU's underwriting program. Respondents counter that KWMU is not a designated public forum.[6] Both parties argue in their respective motions for summary judgment that the Supreme Court's recent decision in **Arkansas Educ. Television Comm'n v. Forbes**, 118 S.Ct. 1633, 1641 (1998), compels entry of judgment in their favor.

Standard for Review. Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." See **Celotex Corp. v. Catrett**, 477 U.S. 317, 322 (1986). An issue of material fact is genuine if it has a real basis in the record;

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[6]NPR also relies on the **Forbes** decision in the amicus curiae brief it has submitted on behalf of Respondents.

and, a genuine issue of fact is material if it "might affect the outcome of the suit under the governing law." **Hartnagel v. Norman**, 953 F.2d 394, 395 (8th Cir. 1992) (citations omitted).

The initial burden is on the moving party to clearly establish the non-existence of any genuine issue of fact that is material to a judgment in its favor. See **City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.**, 838 F.2d 268, 273 (8th Cir. 1988). After the moving party discharges this burden, the non-moving party must do more than show that there is some doubt as to the facts. See **Matsushita Elec. Indus. Co. v. Zenith Radio Corp.**, 475 U.S. 574, 586 (1986). Instead, the non-moving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. See **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 249 (1986). All disputed facts are to be resolved, and all inferences are to be drawn, in favor of the non-moving party. See **Kopp v. Samaritan Health System, Inc.**, 13 F.3d 264, 269 (8th Cir. 1993).

Conclusive assertions of ultimate fact are entitled to little weight when determining whether a nonmovant has shown a genuine issue of fact sufficient to overcome a summary judgment motion properly supported by depositions or affidavits. See **Miller v. Solem**, 728 F.2d 1020, 1024 (8th Cir. 1984). Moreover, where the unresolved issues are primarily legal, rather than factual, summary judgment is particularly appropriate. See **Crain v. Board of Police Comm'rs**, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

The Medium. It is undisputed that KWMU is owned and operated by the Curators of the University of Missouri and that Ms. Bennett and Chancellor Touhill were acting in their capacity as employees of the University when rejecting the Ku Klux Klan's request for underwriting.

It is well settled that the government is not required to allow all forms of speech on property that it owns and controls. See **International Soc'y for Krishna Consciousness, Inc. v. Lee**, 505 U.S. 672, 678 (1992). "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." **Id.** Accordingly, "[r]ecognizing that the Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,' the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." **Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.**, 473 U.S. 788, 800 (1985) (quoting Greer v. Spock, 424 U.S. 828, 836 (1976)). "'[T]he Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum.'" See **Forbes**, 118 S.Ct. at 1641 (quoting Cornelius, 473 U.S. at 802) (alterations in original).

"Traditional public fora are defined by the objective characteristics of the property" and "are open for expressive activity regardless of the government's intent." **Id.** Exclusion is permitted only to the extent necessary to serve a compelling state interest. **Id.** Designated public fora are created by intentional governmental action, i.e., by the government operating a nontraditional public forum for public discourse. **Id.** "If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." **Id.** (citing Cornelius, 473 U.S. at 802; United States v. Kokinda, 497 U.S. 720, 726-27

(1990)). In deciding what is a designated public forum, "'the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.'" **Id.** (quoting Cornelius, 473 U.S. at 802). And, either a nonpublic fora or no fora at all is created when the property is neither a traditional public forum nor a designated public forum. **Id.** The government can, however, "restrict access to nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" **Id.** (quoting Cornelius, 473 U.S. at 800) (alteration in original).

In **Forbes**, the Supreme Court was presented with a dispute arising out of a state-owned public television broadcasting station's refusal to allow an independent candidate with little popular support to participate in a broadcasted debate of candidates for a congressional seat in a particular district. The Court noted that the public forum doctrine first arose in the context of streets and parks. **Id.** at 1639. These "quintessential public forums" have been "'held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" **Perry Educ. Ass'n v. Perry Local Educators' Ass'n**, 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

Distinguishing between broadcast medium and other forms of speech, the Court held that the forum doctrine "should not be extended in a mechanical way to the very different context of public television broadcasting." **Forbes**, 118 S.Ct. at 1639.[7] In such context, "broad rights

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[7]For purposes of a First Amendment analysis, public radio and public television are treated the same, see **Schneider v. Indian River Community College**

of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." **Id.**

The **Forbes** Court analyzed the broadcast medium and claims of access under the precedents of **Turner Broadcasting Sys., Inc. v. FCC**, 512 U.S. 622 (1994) (must-carry provisions of the Cable Television Act are content neutral and are, therefore, subject to an intermediate level of scrutiny; less rigorous standard of scrutiny reserved for broadcast regulation should not be extended to cable television); **FCC v. League of Women Voters of California**, 468 U.S. 364 (1984) (Public Broadcasting Act violated the First Amendment by restricting non-commercial educational stations that receive funds from the Corporation For Public Broadcasting from engaging in editorializing); and **Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.**, 412 U.S. 94 (1973) (**CBS**). In **CBS**, the Court detailed the legislative history of the Radio Act of 1927, which in its original form contained language deeming radio licensees as common carriers in interstate commerce. **Id.** at 106. The Court explained why this provision was excluded from the final version of the Act: "[s]ince it was physically impossible to provide time for all viewpoints . . . the right to exercise editorial judgment was granted to the broadcaster." **Id.** at 111.[8]

Foundation, 875 F.2d 1537, 1541 (11th Cir. 1989), as are television and radio generally, see **McIntyre v. Ohio Elections Comm'n**, 514 U.S. 334, 338 n.3 (1995).

[8]Senator Dill, the principal architect of the Radio Act of 1927, offered the amendment eliminating the common carrier obligation, explaining:

> When we recall that broadcasting today is purely voluntary, and the listener-in pays

"The fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be proportioned out among applicants.'" **League of Women Voters**, 468 U.S. at 377 (quoting CBS, 412 U.S. at 101) (alterations in original). "The justification for our distinct approach to broadcast regulations rests upon the unique physical limitations of the broadcast medium." **Turner**, 512 U.S. at 637. "As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum." **Id.**

The unique nature of the broadcast medium results in "the application of a less rigorous standard of First

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> nothing for it, that the broadcaster gives it for the purpose of building up his reputation, it seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid.

CBS, 412 U.S. at 106 (quoting 67 Cong. Record 12502) (emphasis added).

Amendment scrutiny to broadcast regulation." **Id.** Acknowledging that some criticism has been directed to the "scarcity rationale," the Court "declined to question its validity." **Id.** at 638. "As we said in **Red Lion** '[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" **Id.** quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969)) (alteration in original).

Following the map drawn by these three decisions, the Court held that "[a]s a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination." **Forbes**, 118 S.Ct. at 1639. To hold otherwise, would render broadcasters' normal programming decisions "particularly vulnerable" to these claims because "even principled exclusions rooted in social journalistic judgment can often be characterized as viewpoint-based." **Id.** Claims of access in the area of broadcasting are counterproductive because if given "sweeping application" courts would be required to oversee the daily operations of broadcasters, determining whether various viewpoints are presented sufficiently or provided enough time on air. **Id.** at 1640 (citing CBS, 412 U.S. at 127). This would place control over how public issues are treated on air from the licensees who are accountable for broadcast performance to private individuals, such as Petitioners. **Id.** (citing CBS, 412 U.S. at 124). "In effect, we would 'exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators.'" **Id.** (quoting CBS, 412 U.S. at 125). The "limitations" include obligations imposed on the broadcaster in order to acquire and maintain a license to broadcast. "Among the broadcaster's responsibilities is the duty to schedule programming that serves the 'public

interest, convenience, and necessity.'" **Id.** at 1639 (quoting 47 U.S.C. ' 309(a)).[9] The renewal of a license to broadcast may be denied if the licensee failed in the preceding term of its license to "serve the public interest, convenience, and necessity." 47 U.S.C. ' 309(k)(1)(A).

"In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many." **CBS**, 412 U.S. at 125. These distinctions between broadcasting and other forms of speech compelled the Supreme Court to conclude that "public broadcasting does not lend itself to scrutiny under the forum doctrine[,]" with the narrow exception to the rule presented by candidate debates. **Forbes**, 118 S.Ct. at 1640.

The Court cited two reasons for carving out the exception in **Forbes** and engaging in an examination of the type of fora presented by candidate debates.[10] Neither reason is present in the instant case. First, the Court's finding that a debate permits candidates to express their view with "minimal intrusion by the broadcaster" has questionable application in the instant case. The evidence before the Court is that KWMU personnel review the underwriting text provided by each potential donor, amends and edits the text when it does not meet the underwriting policies of the station, and, in some instances, writes the

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[9]Title 47 U.S.C. ' 309(a) requires that the FCC determine if "public interest, convenience, and necessity" would be served by granting an application for a radio station license.

[10]The Supreme Court determined that the special characteristics of candidate debates supported a conclusion that the broadcast debate was the least restrictive fora -- the nonpublic forum. **Forbes**, 118 S.Ct. at 1640-41.

entire text of the donor's announcement. It is clear that the views expressed by the donors are not those of the station; however, it is a KWMU employee who reads the announcement -- not the donor. In a debate, it is the candidate who speaks and who prepares his or her text which is generally not subject to the broadcaster's editing. Second, while candidate debates are of "exceptional significance in the electoral process," **Forbes**, 118 S.Ct. at 1640, underwriting announcements hold a less significant position in the electoral process and, standing alone, do not enjoy the revered tradition in the broadcasting field as do candidate debates.

Petitioners argue that "**Forbes** teaches that while public broadcasting 'as a general matter does not lend itself to scrutiny under the forum doctrine,' the broadcaster can exercise its editorial discretion to designate certain portions of its programming as various types of public fora." (Mem. at 2.) The Court reads a different lesson in **Forbes**: public broadcasting, because of the unique nature of the medium, does not, with the one exception of candidate debates, "lend itself to scrutiny under the forum doctrine." **Forbes**, 118 S.Ct. at 1640 (emphasis added). Accordingly, the enhanced underwriting program implemented at KWMU to raise funds for its operation is not a forum.

Petitioners further argue that enhanced underwriting program is a revenue-generating operation at KWMU and therefore does not enjoy the protection granted in **Forbes** to editorial discretion. The underwriting program is more properly analogous to advertising space on buses, Petitioners contend, than to the broadcast programming of **Forbes**. Again, Petitioners misapprehend the scope of **Forbes**. Broadcasters have a finite amount of air time; what is broadcast during that time is a matter of discretion. If the broadcasters fail to air programs that serve the "public interest, convenience, and necessity," their license will not be renewed. To finance their programs, KWMU

exchanges a fifteen second announcement for funds. The text of that announcement and who may provide the funds are subject to regulation and to KWMU's guidelines. The announcement is read by KWMU's employees. To interpret the enhanced underwriting program as a forum would be to engage the courts in the day to day operation of the radio station -- an engagement prohibited by **Forbes**.

For the foregoing reasons, the Court finds that KWMU is not required to accept the Ku Klux Klan's offer to underwrite "All Things Considered."

The Fora. Were the Court to engage, however, in a forum analysis, the Court would not find, as urged by Petitioners, that KWMU's enhanced underwriting program is a designated public forum.

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." **Cornelius**, 473 U.S. at 802. Moreover, the government does not create a designated public forum when it reserves eligibility to a class of speakers who must obtain permission to use the property. **Forbes**, 118 S.Ct. at 1642; **Perry Educ. Ass'n**, 460 U.S. at 47. "In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.@ **Cornelius**, 473 U.S. at 801.

Petitioners cite the following cases as authority for their argument that KWMU created a designated public forum by accepting enhanced underwriting gifts: **Rosenberger v. Rector and Visitors of the Univ. of Virginia**, 515 U.S. 819 (1995) (denial of funds to university student organization which published newspaper with religious editorial viewpoints violated First Amendment; guidelines for funding did not prohibit religion as subject matter but selected for disfavored treatment journalistic efforts with

religious editorial viewpoints); **International Soc'y for Krishna Consciousness, Inc. v. Lee**, 505 U.S. 672 (1992) (airport authority's prohibition on solicitation of contributions inside airport terminal, a nonpublic forum, was reasonable); **Widmar v. Vincent**, 454 U.S. 263 (1981) (exclusion of religious groups from university's open forum policy, making university's facilities generally available for student group activities, violated religious groups' First Amendment rights); **Burnham v. Ianni**, 119 F.3d 668 (8th Cir. 1997) (removal of photographs of professors with objects related to their academic interests from university department display case violated professors' First Amendment rights); **New York Magazine v. Metro Transp. Auth.**, 136 F.3d 123 (2nd Cir. 1998) (public transit authority's refusal to display magazine's advertisement using mayor's name to promote commercial product on buses, designated public forum, violated magazine's First Amendment rights); **Air Line Pilots Ass'n Int=l v. Dept. of Aviation of the City of Chicago**, 45 F.3d 1144 (7th Cir. 1995) (city's rejection of union's advertisement critical of airport from display cases at airport, a public forum, violated union's First Amendment rights); and **Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.**, 767 F.2d 1225 (7th Cir. 1985) (transit authority's refusal to rent space in advertising space on system, a public forum, to Planned Parenthood group violated that group's First Amendment rights). In each case, Petitioners argue, the government's exclusion of a group from its property traditionally available for public expression was subjected to highest scrutiny.

Significantly, the foregoing cases did not involve broadcasting or a similarly scarce resource. The Supreme Court has been reluctant to force or order publishers or broadcasters into accepting forms of speech. See e.g. **Arkansas Educ. Television Comm'n v. Forbes**, 118 S.Ct. 1633 (1998) (state-owned television station's exclusion of a

candidate from a televised debate was a viewpoint neutral exercise of journalistic discretion); **FCC v. League of Women Voters**, 468 U.S. 364 (1984) (section of the Public Broadcasting Act forbidding noncommercial educational stations which received funds from the Corporation for Public Broadcasting from engaging in editorializing violated the First Amendment); **Miami Herald Publishing Co. v. Tornillo**, 418 U.S. 241 (1974) (state statute requiring newspapers that criticized a public candidate to provide free space for that candidate's reply violated newspapers' First Amendment rights); **Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.**, 412 U.S. 94 (1973) (FCC ruling allowing broadcasters not to accept editorial advertisements did not violate advertisers' First Amendment Rights).

The uncontradicted testimony is that employees at KWMU review each request for underwriting. The text of the announcement is reviewed and edited when KWMU determines that a change is necessary. Permission from KWMU is required in order to underwrite a program. The underwriting announcement is read by KWMU employees on air and is not read by a representative of the underwriter. KWMU is authorized to accept underwriting funding but is required to identify the underwriters on air. See 47 U.S.C. ' 317(a)(1). The underwriting announcement is limited to fifteen seconds and may not interrupt regular programming. See 47 C.F.R. ' 73.503(d). KWMU is precluded from accepting advertising over its airways. See 47 U.S.C. ' 399(b)(2). FCC regulations do not allow public radio stations to broadcast messages promoting or criticizing ballot issues nor is the station allowed to broadcast political announcements from candidates, except those running for federal office.

It is undisputed in the instant case that KWMU seeks underwriters to support the station. Indeed, the station has a whole division dedicated to seeking underwriters. Thus,

it is arguable that the point of the underwriting program is to generate income, not to provide an underwriter with a forum. Nonetheless, in return for the donation, KWMU provides the underwriter with fifteen seconds of air time for a message. The underwriter is not, however, given carte blanche with that time and is subject to the restrictions noted above.

The foregoing restrictions demonstrate the inapplicability of a designated public forum designation to KWMU's underwriting policy. To demonstrate otherwise, Petitioners must establish that the government "intended to designate a place [KWMU] not traditionally open to assembly and debate as a public forum." **Cornelius**, 473 U.S. at 802. Petitioners have failed to do so.

The Fifth Circuit Court of Appeals designated a state's adopt-a-highway program to be a nonpublic forum in **State of Texas v. Knights of the Ku Klux Klan**, 58 F.3d 1075 (5th Cir. 1995). The state had rejected the Ku Klux Klan's application to "adopt" a portion of a highway near a public housing project subject to a continuing desegregation order. The Court noted that the purpose of Texas' adopt-a-highway program was to allow citizens an opportunity to support the state highway department's efforts to control and reduce litter and was not to open the highway for "public discourse." **Id.** at 1078. "Any opportunity for speech provided by the Program is peripheral to that central purpose. The government does not create a public forum merely by permitting some speech." **Id.** (citing Cornelius, 473 U.S. at 802; Perry Educ. Ass'n, 460 U.S. at 47.) The Court considered several factors when it concluded that the adopt-a-highway program was a nonpublic forum. As noted above, the primary purpose of the program was to keep the highways litter-free, it was not to be a forum for

expressive activity.[11] **Id.** Moreover, as noted by the Court, the "State of Texas restricts and controls the size and content of the signs posted at the ends of the adopted miles." **Id.** (regulatory citation omitted). Persons who were not state officials could not erect their own signs without state authorization. **Id.** at 1079. The Court held that "[s]uch limitations on the quantity and content of speech are indicative of an intent to maintain a nonpublic forum." **Id.** (citing Cornelius, 473 U.S. at 800). Additionally, the State of Texas restricted participation in the program to certain entities, excluding individuals and political organizations, and required that all applications had to be approved by the state's department of transportation. **Id.** But cf. **Knights of the Ku Klux Klan v. Arkansas State Highway and Transp. Dep't**, 807 F. Supp. 1427 (W.D. Ark. 1992) (state's denial of Knights of the Ku Klux Klan's application to participate in state's adopt-a-highway program, a public forum, violated that organization's First Amendment rights).

It is undisputed that KWMU is not a traditional public forum; and, for the reasons set forth above, the Court rejects Petitioners' argument that it is a designated public forum. Accordingly, the property is, at best, a nonpublic forum.[12] "The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because the public officials oppose the speaker's view.'"

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[11]The Court notes that in the Texas case the extent of the "discourse" was simply the organization's name on a sign at the beginning and at the end of the adopted stretch of highway, as compared to the enhanced underwriting permitted by KWMU.

[12]As discussed above, however, the Court first finds that KWMU is not a forum at all.

Forbes, 118 S.Ct. at 1641 (quoting Cornelius, 473 U.S. at 800) (alteration in original). "To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." **Forbes**, 118 S.Ct. at 1643 (citing Cornelius, 473 U.S. at 800).

The evidence is undisputed that Chancellor Touhill made the decision to refuse Petitioners' underwriting gift based upon business and economic reasons and not because she was attempting to suppress Petitioners' views. Chancellor Touhill is an experienced college administrator. Her decision to refuse Petitioners' offer to underwrite a program was based upon her expertise as a college administrator and Chancellor. The reason for the rejection is similar to the rationale used by the Arkansas Educational Television Commission in **Forbes**. In that case, the Court found that the television station's refusal to allow a candidate in a debate was not viewpoint based. 118 S.Ct. at 1643-44. The Court specifically found that the Commission's executive director determined that: (1) the Arkansas voters did not consider Forbes a serious candidate; (2) the national news organizations did not plan to run Forbes' name in results on election night and did not consider him a serious candidate; and (3) Forbes had little financial support and no headquarters other than his home. **Id.** "It is, in short, beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest. There is no substance to Forbes' suggestion that he was excluded because his views were unpopular or out of the mainstream. His own objective lack of support, not his platform, was the criterion." **Id.** at 1644 (interim citation omitted).

In the instant case, Chancellor Touhill determined that accepting underwriting from the Ku Klux Klan would result in a loss of financial support from the school's

patrons. She considered the makeup of the school's enrollment and through her experience and knowledge determined that there would be a loss of enrollment and, therefore, a loss of money to the University if she accepted the Ku Klux Klan's underwriting gift. She testified as to the approximate amount of financial support that UMSL would lose if KWMU were to read the Ku Klux Klan's underwriting message on the air. Petitioners did not challenge the figures. As Petitioners note, however, there is no evidence that Chancellor Touhill collected empirical data to support her position. Nor was there such evidence in **Forbes**.

The Court finds that KWMU's decision was not viewpoint based.

Conclusion

Petitioners vigorously argue that the general unpopularity of their viewpoint and a misperception that their viewpoint is linked with violence should not, consistent with their First Amendment rights, preclude them from underwriting a program on a public radio station, specifically "All Things Considered" on KWMU. Arguments such as Petitioners'assist the courts in safeguarding the First Amendment. As important as these arguments are, however, Petitioners are not guaranteed access to all medium simply because their viewpoints are unpopular. They are not guaranteed access to a public radio station, given the unique nature of the medium. For the reasons set forth above, the Court finds that KWMU is not a forum and the rejection of Petitioners' request to underwrite a program on KWMU is not a violation of their First Amendment rights.

Accordingly,

IT IS HEREBY ORDERED that Respondents' Motion for Summary Judgment is **GRANTED** [Doc. 40]; and

IT IS FURTHER ORDERED that Petitioners' Motion for Summary Judgment [Doc. 44] is **DENIED**.

A separate Judgment shall accompany this Memorandum and Order.

THOMAS C. MUMMERT, III

UNITED STATES MAGISTRATE JUDGE

Dated this 10th day of May, 1998.